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James R. Hemingway

JOINT TENANCY IN BANK ACCOUNTS

JAMES R. HEMINGWAY[1]

JOINT tenancy, in spite of the disfavor with which it has been regarded by the courts, has become increasingly popular among owners of property, especially among trusting husbands, as an effective and inexpensive way to transfer property at death. The average individual has a dread of what seems needless expense and delay of probate and frequently will put every worldly possession he can in joint tenancy, where the surviving joint tenant is, immediately upon the death of one, the owner of the property without any delay and with little expense other than payment of the usual inheritance tax.

At common law, joint tenancy might exist in either real or personal property where title came to two or more persons at the same time and from the same source (other than by descent). No particular words were required to be used, but to avoid a joint tenancy and create a tenancy in common words of severance were required to be used.

It mattered not how the title to the property came to the joint tenants, whether by testamentary gift, gift *inter vivos,* or gift *causa mortis,* as long as the elements of joint tenancy were all present. These elements were known as the four unities, those of interest, title, time and possession. Both or all the tenants concurrently acquired the same interest, their title came to all from the same source and at the same time, and they each had a possessory right in the entire property—they were said to hold *per my et per tout,* by the moiety and by the whole. Because of this fourfold unity, the survivor of the joint tenants became the owner of the property, for, since the interest of each extended to the whole and not only a share, the whole remained in the survivor

[1] Professor at the College.

and there was nothing to pass to the next of kin of the decedent.

Since early days in this country, real estate has been widely held in joint tenancy. Personal property was less frequently so held. Because of the legal disfavor of estates in joint tenancy, many states abolished joint-tenancy tenure altogether. Others passed statutes providing that joint tenacy could not exist unless language was used that would plainly indicate an intent to create a joint tenancy.

The statutes and judicial decisions in Illinois are representative of the attitude of the law throughout the United States toward this tenure. Here the General Assembly on January 15, 1821, passed an act "concerning partitions and joint rights and obligations." The first two sections of this act read:

> Section 1. Be it enacted . . . that all joint tenants or tenants in common who now are or hereafter shall be possessed of any estate of inheritance, or estate less than those of inheritance, either in their own rights or in the right of their wives, may be compelled to make partitions between them, of such lands, tenements or hereditaments as they now hold or hereafter shall hold as joint tenants or tenants in common.
>
> Section 2. That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators and be considered to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common.

Section 1 changes the common law, where one joint tenant could not compel the other to partition although a partition was possible by agreement.[2]

The effect of the second section was practically to abolish joint tenancy as it existed at common law as to

[2] Litt., Sec. 290; 2 Bl. Com., 185.

parties holding in their own right or that of their wives. The right of survivorship, the most important characteristic of joint tenancy, remained only to executors, trustees or those holding *in autre droit.* Joint tenancy as to others was nothing more than tenancy in common.

On January 31, 1827, however, the General Assembly passed "An act concerning conveyances of real property," the fifth section of which read:

> No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy, and every such estate, other than to executors or trustees, (unless otherwise expressly declared as aforesaid), shall be deemed to be a tenancy in common.

This statute being the later legislative act, so far as it was inconsistent with the statute of 1821, worked a repeal or modification of the earlier statute. The effect of the statute of 1827 was interpreted by the Supreme Court in *Mette et al.* v. *Feltgen*,[3] where it was said:

> In using without explanation or qualification the terms "joint tenancy" and "tenancy in common," terms having at common law a fixed and well understood meaning, it was doubtless intended to use them in their ordinary common law sense. Its effect was to restore the right to create estates in joint tenancy, as known at common law, in so far as that right was abrogated by the act of 1821, rather by tacit recognition than by express words. . . .

By implication, therefore, the right of survivorship was restored. In so holding, the court in the same case said:

> There is nothing in the act of 1827 furnishing the least indication that the legislature intended to attach to joint tenancies where the tenants held in their own right, any other or different incidents, than those which properly belonged to the estate where

[3] 148 Ill. 357.

executors or trustees were the tenants. It is beyond question that in the latter class of joint tenancies it was the intention of the act that the incident of survivorship should prevail, and as the act furnishes no indication to the contrary, it would seem to be equally clear, that the same rule was intended to apply to those where the tenants were such in their own right.

Whether this statute passed just six years after that abolishing joint tenancy indicated a change in attitude, it is hard to say. It may be that the nature of the tenure itself was considered unobjectionable but that the Legislature merely held it in disfavor because it imposed certain restrictions which the joint tenants themselves might not have desired. At any rate, the common law rule again prevailed with the exception that the presumption of the creation of a joint estate, where words indicating an intention to the contrary were not used, was reversed. It was presumed that a tenancy in common was intended unless express words were used to indicate an intention to create a joint tenancy.

But, it will be noted that the act of 1821 referred to property generally while that of 1827 referred to real property. Consequently it was held that joint tenancy and the right of survivorship in personalty was affected only by the former statute.[4] The common law form of joint tenancy with its incident of right of survivorship as to personalty, therefore, could have been considered to have been abolished by the act of 1821 and as not revived by the act of 1827. This was held to apply to bank deposits too, although an express attempt had been made to create survivorship rights.[5]

Section 2 of the act of 1821 stood substantially without change until 1917 when a proviso was added reading as follows:

Provided that when a deposit in any bank or trust company transacting business in this State has been made or shall here-

[4] Hay v. Bennett, 153 Ill. 271.

[5] Lemen v. Estate of Grote, 203 Ill. App. 50.

after be made in the name of two or more persons, payable to them, jointly or severally evidenced by a writing signed by them when the account is opened, such deposit or any part thereof or any interest or dividend thereon may be paid to any one of said persons, whether the other or others be living or not; when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter and the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payment so made.[6]

What was the object of this proviso? Was it merely for the protection of banks which, carrying an account in the name of two or more persons, pay to one of such persons the balance in the account, not knowing that the other joint depositor is deceased? Or, was it intended to define the property rights of the parties so that a survivor will be entitled to all the money even as against the heirs of the deceased joint depositor? If the former, why is an agreement between the parties necessary when the statute would control without it? If the latter, was it intended that the title to the share of one joint depositor shall pass upon his death to the survivor without the formality of a will? Provisions similar to this proviso have appeared in statutes in other states and have been interpreted to relate only to the bank and not to the rights as between the depositors.[7]

The first case to reach the Supreme Court of Illinois involving rights of the survivor of two joint depositors and the heirs of the deceased joint depositor was that of *Erwin* v. *Felter*.[8] There it was held that where certificates of deposit are made payable to the depositor or another named person, or to the survivor, and they are left with the bank with instructions, agreed to by the bank, to pay the money to the other person at the death

[6] Laws 1917, p. 557.

[7] Godwin v. Godwin, 141 Miss. 633; Re Morgan, 28 Ohio C. A. 222; Gordon v. Toler, 83 N. J. Eq. 25.

[8] 283 Ill. 36.

of the depositor, the other person upon the death of the depositor, will be entitled to the money. The certificates of deposit in this case were left with the bank on receipt evidencing the bank's acceptance of the terms, and the other party had knowledge of the deposit and had received some payments therefrom. But the signature of the depositor only was used.

The depositor died in 1914 and the opinion of the Supreme Court was filed on February 20, 1918. Meanwhile, the proviso above quoted was added to the statute and approved on June 26, 1917, but no reference is made thereto by the court in its opinion. Nor would it change the matters any, for the rights of the parties would have to be determined as of the time, 1914, when their interests became vested.

No reference was made by the court to the provisions of the act of 1821 abolishing joint tenancy, nor to the case of *Hay* v. *Bennett*,[9] where the statute was interpreted. On the other hand, it expressly stated that joint tenancy in personalty might exist, but cited in support of that statement only a Massachusetts case.[10] It is possible, as suggested by the Appellate Court,[11] that the statute of 1821 only abolished joint tenancy when created by operation of law and not by contract.

The Supreme Court later remarked that while the language in *Erwin* v. *Felter* was unguarded, the conclusion reached was correct. Whether or not a technical joint estate was thereby constituted, the contract was not unlawful but would be enforced. To clarify the situation, the Legislature passed an act on June 30, 1919,[13] Section 2 of which provides:

Except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to

9 153 Ill. 271.
10 Chippendale v. North Adams Savings Bank, 222 Mass. 499.
11 Reder v. Reder, 228 Ill. App. 21.
12 Illinois Trust & Savings Bank v. Van Vlack, 310 Ill. 185.
13 Laws 1919, p. 634.

create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between joint tenants or owners of personal property is hereby abolished, and all such joint tenancies or ownerships, shall, to all intents and purposes, be deemed tenancies in common. . . .

Many states have similar statutes or have arrived at the same point by judicial decision. The common law rule is not revived, however, for an intention to create a joint tenancy must now be expressed; and all language will not express such an intention.

It was held prior to the act of 1919 that the following contract was sufficient to create a joint tenancy in a bank account: "We hereby open our joint account with you and authorize and instruct you to honor the signature of both or either, or the survivor, in the withdrawal of funds or any other transaction in connection with this account."[14] Both parties signed the statement. The case decided that the survivor was entitled to the fund as against the administrator. But "payable to the order of either on return of this certificate properly endorsed," or "payable to the order of self or wife in current funds on the return of this certificate properly endorsed," do not indicate an intention to create a joint tenancy, because where a promissory note or certificate of deposit is made payable to two or more persons without designating the proportion each is to take, the law presumes they are to take in equal shares.[15] In the case which is authority for the preceding statement it was held that, as applied to real estate, the words "as joint tenants," without the addition of the words "and not as tenants in common," were sufficient to evidence an intention to create a joint tenancy with right of survivorship. A deposit in the names of two depositors connected by "or" does not constitute a joint tenancy, the disjunctive negativing the idea of unity required in a joint tenancy.[16]

[14] Reder v. Reder, 312 Ill. 209.

[15] Engelbrecht v. Engelbrecht, 323 Ill. 208.

[16] Boyle v. National Union Bank of Dover, 7 N. J. Misc. 32; Commercial Trust Co. v. White, 99 N. J. Eq. 119; Succession of Sharpe, 158 La. 61; Thomas v. Houston, 181 N. C. 91.

Where a bank account was opened in the name of "Mr. and Mrs. Harry Crawford" it was held that the wording was insufficient under the statute to create a joint tenancy, there being no other written evidence of an intent to create such an estate.[17] In *Hamilton* v. *First State Bank of Willow Hill*[18] where certificates of deposit were procured by a father payable "to the order of myself or Carrie Kern or the survivor of them, on the return of this certificate properly endorsed," it was held that the transaction was not the creation of a joint tenancy within the terms of the statute. It was not explained in what way the statute was not complied with unless the words used were insufficient to create a joint tenancy under the statute. The case may have been influenced by the fact that the certificates of deposit were retained in the possession of the father until his death. There was no agreement between the father and daughter and no consideration passed from the daughter.

We may assume from this last case that joint tenancy is not always successfully created by mere use of words, however clear, and whether or not they might otherwise be sufficient to comply with the statute, as though by a magic formula. At common law, especially in its earlier days, the property which passed to the joint tenants was usually willed or deeded to them by the owner, whose intent would not be questioned by the administrator or executor of the surviving joint tenant. When the feature of joint tenancy as a means of passing property at death without a will came to be appreciated, the practice of putting one's own property in joint tenancy with a near relative or friend became more and more prevalent. Such a joint tenancy was frequently one in name only, for the owner would continue to control and enjoy the property exclusively until his death. The executor or administrator of the deceased joint tenant would then claim the property on the theory that no real interest had ever passed to the surviving joint tenant during the

[17] In re Estate of Crawford, 245 Ill. App. 227.
[18] 254 Ill. App. 55.

lifetime of the decedent. It would have to be shown, of course, that the decedent had intended to pass a present interest, for otherwise he would be merely attempting to make a will in an unauthorized manner. The mere fact that one deposits money in the bank, for example, in his own name and that of another does not necessarily show that such other has a present interest any more than where one deposits his money under a fictitious name, in which case one having the same name as that in which the money is deposited would have no title in the money.

One might take it for granted that where joint tenancy is permitted in personal property a joint tenancy might exist in a bank account. For two reasons it is not so obviously simple to understand how a joint tenancy may exist in a bank account.

In the first place, property usually came to the joint tenants from a third person at common law. If a man wished to put title in himself and another as joint tenants, he would do so by first conveying to a third person and then having the third person reconvey to himself and the other as joint tenants. A person could not immediately convey a joint tenancy to himself and another because he would pass no title to himself by such a conveyance; and the tenants, not acquiring their title at the same time, could not be joint tenants.

In the second place, one of the fundamental rules at common law was that a joint tenancy between two persons was destroyed by the conveyance or severance of the joint property by either one. When a bank account is placed in joint tenancy, however, one or both of the joint tenants usually expects to draw out money from time to time, replace additional money, and again withdraw it, especially if the account is subject to check. If it is a true common law joint tenancy, why is it not destroyed by the first withdrawal?

These questions do not seem particularly to perplex the courts, except when the entire consideration is furnished by one of the joint tenants. Upon the death of

one joint tenant it frequently becomes the problem of the court to determine whether or not a joint tenancy was so created as to entitle the survivor to the whole. If merely placing money in the bank in the name of another does not give that other title to the property, why should it do so where money is deposited in the names of the depositor and another as joint tenants?

This proposition leads many courts to say that where one person furnishes the entire consideration, evidence must exist to show that he intended to make a gift to the one who is made a joint tenant with him.[19] Some courts explain the difficulty away by finding a trust. Other courts seem to overlook the source of the property so long as the technical requirements are present to create a joint tenancy; that is, so long as it appears that the four unities are present. To still other courts, the controlling feature appears not to be the presence of a gift, trust, or the four unities, but the existence between the parties of a contract which will control regardless of who furnished the consideration.

If the joint tenancy is to be sustained on the theory that the owner of the property has made a gift to the joint depositor who furnishes no consideration, all the requisites of a gift *inter vivos* or *causa mortis* must be present. Intent is absolutely essential and without it there can be no joint tenancy;[20] but either an actual or

[19] Bradford v. Eastman, 229 Mass. 499; Hudson v. Bradley, 176 Ark. 853; Clark v. Bridges, 163 Ga. 542; In re Estate of Crawford, 245 Ill. App. 227; In re Belgard's Estate, 202 Iowa 1356; Battles v. Millbury Sav. Bk., 250 Mass. 180; McLeod v. Hennepin County Sav. Bk., 145 Minn. 299; Foschia v. Foschia, 158 Md. 69; Burns v. Nolette, 83 N. H. 849; Skillman v. Wiegand, 54 N. J. Eq. 198; Jones v. Fullbright, 197 N. C. 274; Everly v. Dunkley, 27 Ont. L. Rep. 414; Mardis v. Steen, 293 Pa. 13; Talbot v. Cody, 10 Ir. Rep. Eq. 138; Shortell v. Grannan, 55 D. L. R. 416; Craig v. Cuningham, 53 N. S. 117.

[20] Bradford v. Eastman, 229 Mass. 499; Hudson v. Bradley, 176 Ark. 853; Clark v. Bridges, 163 Ga. 542; Engelbrecht v. Engelbrecht, 323 Ill. 208; In re Belgard's Estate, 202 Iowa 1356; Succession of Sharpe, 158 La. 61; Battles v. Millbury Sav. Bk., 250 Mass. 180; Appeal of Garland, 126 Me. 84; McLeod v. Hennepin County Sav. Bk., 145 Minn. 299; Foschia v. Foschia, 158 Md. 69; Burns v. Nolette, 83 N. H. 849; Skillman v. Wiegand, 54 N. J. Eq. 198; Jones v. Fullbright, 197 N. C. 274; Everly v. Dunkley, 27 Ont. L. Rep. 414; Mardis v. Steen, 293 Pa. 13; Raftery v. Reilly, 41 R. I. 47.

constructive delivery is just as essential. "So essential is delivery as a factor in the transaction that it is said: 'Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite without which the gift fails.'"[21] The case which is authority for this statement held that there was no gift, although the vendor of land directed the purchaser to deposit the consideration in the joint names of himself and one Maurer, payable to either or the survivor; although Maurer went with the purchaser to the bank to see that the deposit was properly made; and although the order and pass book were delivered to the vendor by the purchaser in the presence of Maurer.

On the other hand, it appears that there is a sufficient delivery where the donor and donee both sign the signature card by which the bank is directed to open an account in the names of the donor and donee as joint tenants with right of survivorship, and this will be evidence of a gift unless there is contrary evidence that the donor had no donative intent.[22] Since a bank account is a chose in action, manual delivery is impossible, but delivery can be effected by an assignment.[23] Where the deposit is evidenced by a pass book in the joint names of the donor and donee, the question has frequently arisen as to whether a delivery of the pass book, without which the donee could not withdraw the funds, is essential to the completion of a gift. The cases are divided. In his work on Banks and Banking, Tiffany says:

Where the depositor delivers the pass book to the other with the purpose of making a gift, it is generally conceded that a joint tenancy is created. Some courts refuse to hold such deposits valid as gifts when the depositor retains the pass book, but by the better rule, if the intent to create a joint tenancy appears, whether the book be delivered or not is of no consequence. This has been explained on the ground that the trans-

21 Rice v. Bennington County Sav. Bk., 93 Vt. 493. See also, Thomas v. Houston, 181 N. C. 91.

22 Commercial Trust Co. v. White, 99 N. J. Eq. 119.

23 Grady v. Sheehan, 256 Pa. 377.

action creates a contractual relation between the bank and the donee, and while by retention of the pass book the donor still has the power to withdraw the deposit, thereby making the gift of no value, the legal effect of the transaction as a gift becomes complete upon the consummation of the contract which the bank enters into with both jointly, and which, having the incident of survivorship, vests the right of action thereon in the survivor.[24]

This quotation is cited with approval in *Commonwealth Trust Co.* v. *Du Montimer,*[25] but the explanation hardly seems sufficient. A gift can not have strings on it. It might be admitted that delivery of the pass book would not be essential, provided the donee had some access to the money, whether or not he desired to avail himself of such access.[26] Thus there was a sufficient delivery in the case of *Cleveland Trust Co.* v. *Scobie,*[27] where the donor left the book with the bank so that either might draw. Mere delivery of the pass book alone is not necessarily a delivery of the gift, because possession of a bank book alone does not entitle one to draw money from the bank unless the bank recognizes such person as a creditor. But, neither does depositing money in another person's name constitute a gift unless the other is enabled to reach the fund in consequence of the donor's intention. Authorities are not wanting in support of this view.[28] Where the deposit is joint, however, the possession of the pass book by one joint depositor would be possession by the other unless evidence appeared to show that the pass book was exclusively retained by the donor depositor.[29]

In some states, if a depositor opens an account in his name and that of another, either or the survivor to have

24 P. 460.

25 193 Mo. App. 290.

26 114 Ohio St. 241.

27 Dupont v. Jonet, 165 Wis. 554.

28 Norway Savings Bank v. Merriam, 88 Me. 146; Whalen v. Milholland, 89 Md. 199; Christensen v. Ogden State Bank (Utah), 286 Pac. 638.

29 Illinois Trust & Savings Bank v. Van Vlack, 310 Ill. 185; Appeal of Main, 73 Conn. 638.

the right to draw, this will be conclusive evidence by statute, after the death of either, of an intention to create a joint tenancy.[30] In other states, the statute dispenses with the necessity of proof of intent to make a gift by making the act of creating the joint account *prima facie* evidence of such intent,[31] although this evidence would be subject to rebuttal by competent proof of a contrary intention.[32] In the absence of such a statute, however, proof of the intent to make a gift would be a prerequisite to the creation of a joint tenancy where one joint tenant furnishes the entire consideration. This intention usually is shown to be either that the donee shall have an interest in the fund only upon the donor's death or that he shall have a present joint interest.

Were it not for a few cases holding to the contrary, one might entertain no doubt but that the former intent would be insufficient to sustain a gift (leaving out of the question gifts *causa mortis,* where there is a present gift, subject only to later revocation upon the condition of recovery). Where there is an attempt to make a gift effective only at death, the gift is testamentary and the instrument creating the donee's interest must be executed with all the formalities required by the statute of wills. The majority of cases rightly hold that where such an intent is shown the gift cannot be sustained, and the mere fact that the would-be donor has deposited the money in a joint account does not divest him of title or invest his co-tenant with any title.[33] This is so even though the co-tenant would be able to draw on the ac-

30 Strail v. Suter's Estate, 248 N. Y. Supp. 624; Heiner v. Greenwich Savings Bank, 193 N. Y. Supp. 291; Moskowitz v. Marrow, 251 N. Y. 380; Houle v. McMillan, 83 Colo. 216.

31 Mississippi Valley Trust Co. v. Smith, 320 Mo. 989; In re Rehfeld's Estate, 198 Mich. 249.

32 Schnur v. Dunker, (Mo. App.) 38 S. W. (2d) 282.

33 McLeod v. Hennepin County Sav. Bk., 145 Minn. 299; Grady v. Sheehan, 256 Pa. 377; Smith v. Gosnell, 43 Ont. L. Rep. 123; Shortill v. Grannan, 47 N. B. 463; Hill v. Hill, 8 Ont. L. Rep. 710; Daley v. Brown, 39 Can. S. C. 122; Hudson v. Bradley, 176 Ark. 853; Barstow v. Tetlow, 115 Me. 96; Godwin v. Godwin, 141 Miss. 633; McNabb v. Fisher, (Ariz.) 299 Pac. 679.

count, since his drawing would not be inconsistent with ownership in the depositor.[34]

In *Morristown Trust Co.* v. *Capstick*,[35] a husband opened a joint account in the names of himself and his wife. In a memorandum book he had a notation that "My bank accounts are jointly held by my wife and self. Either can draw upon the accounts." It was his evident intention, however, that the wife should draw upon the account only upon his death. According to one witness, he had said that a woman "who was left alone in the world with an estate to settle was in a bad way;" that if he died she could use this money to settle up things while waiting for the estate to be closed. The decedent's wife, herself, testified that her husband said to her, "Dearie, I have opened a joint account in the Morristown Trust Company with you, and you may draw on it to the full amount; but, if you do, I will give you hell." The court said, "I find it impossible to infer an intention to make an immediate gift."

The foregoing opinion would seem almost inevitable where a gift is deemed a prerequisite to the creation of a joint tenancy in which one of the joint tenants furnishes the entire consideration. The cases which have supported the right of the survivor donee—although the intention of the donor was to give the donee an interest only at death—proceed on the basis that where a joint tenancy is created a legal right arises in the donee joint tenant regardless of rules concerning gifts,[36] that the statute creating a right in the surviving joint tenant controls regardless of the intent of the donor,[37] or that a present gift is made with enjoyment postponed.[38] The

[34] Wolfe v. Hoefke, 124 Wash. 495; Taylor v. Henry and Bruscup, Adm'rs, 48 Md. 550; Denigan v. Hibernia Savings & Loan Soc., 127 Cal. 137; 59 Pac. 390; Schick v. Grote, 42 N. J. Eq. 352; Marshal v. Crutwell, 20 L. R. Eq. 328.

[35] 90 N. J. Eq. 22.

[36] Dunn v. Houghton, (N. J. Eq.) 51 Atl. 71; Weese v. Weese, 37 Ont. L. Rep. 649.

[37] People's State Bank of Holland v. Miller's Estate, 198 Mich. 783.

[38] First National Bank of Aurora v. Mulich, 83 Colo. 518.

first two of these theories really do not consider a gift a necessary element and fall within another doctrine which will be discussed later. In the last theory we encounter the objection that there is a no relinquishment of control. If it is a gift, it is testamentary in character and in violation of the statute of wills. It is true that a present gift may be made with postponement of enjoyment, but enough must be done to pass a present title. Therefore, to hold that a valid gift *inter vivos* exists where a person retains absolute control over the property during his life and intends that the donee shall have only what is left upon his death, is to belie the facts.[39] The mere fact that the deposit is made in the name of the donee or in the names of the donor and donee without qualification may be *prima facie* evidence of a gift, yet evidence would be admissible to show the real intent, control not having been relinquished by the donor.[40]

Where the intent of the donor is that the donee shall have a present joint interest with him, some authorities are of the opinion that the title of the donee may be sustained after the donor's death.[41] Others are of the opinion that the gift cannot be sustained, since all control is not relinquished.[42] Certainly it is one of the essential elements of a gift that the donor relinquish control. "Indian gifts" were unknown and foreign to the principles of the common law. The point is admitted by courts holding either of the foregoing views. The only difference in opinion appears to result from their idea

[39] Sullivan v. Sullivan, 161 N. Y. 554; Hicks v. Meadows, 193 Ala. 246; Nutt v. Morse, 142 Mass. 1; Robinson v. Ring, 72 Me. 140.

[40] Orr v. McGregor, 43 Hun 528.

[41] Kelly v. Beers, 194 N. Y. 49; Mardis v. Steen, 293 Pa. 13; Commonwealth Trust Co. v. Du Montimer, 193 Mo. App. 290; Kaufman v. Edwards, 92 N. J. Eq. 554; Raftery v. Reilly, 41 R. I. 47; Negaunee Nat. Bk. v. Le Beau, 195 Mich. 502; Mississippi Valley Trust Co. v. Smith, 320 Mo. 989; McLeod v. Hennepin County Sav. Bk., 145 Minn. 299.

[42] Staples v. Berry, 110 Me. 32; Pearre v. Grossnickle, 139 Md. 274; Denigan v. Hibernia Sav. & Loan Soc., 127 Cal. 137; Denigan v. San Francisco Savings Union, 127 Cal. 142; Daly v. Pacific Savings & Loan Association, 154 Wash. 249; Meyers v. Albert, 76 Wash. 218; Schick v. Grote, 42 N. J. Eq. 352.

of what constitutes relinquishment of control. In *Taylor* v. *Henry and Bruscup, Administrators,*[43] the court said:

> Here the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus restrained the power to draw out the money, the deceased did not divest himself of dominion and control over the fund. He could have drawn out every dollar the day after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother, and the only evidence relied on to support the factum of the supposed gift, is the form of the entry in the bank-book.

Perhaps the difference between the two lines of decision is an apparent difference only, for in the Taylor case, and others supporting the same view, the facts are consistent with an intent that the joint account be established only for convenience of the donor, so that his co-depositor could act as his agent in withdrawing funds, or with an intent that the donee receive an interest only at the death of the donor. In the cases apparently holding to the contrary, the intent of the donor is clearly to give the donee a present interest in the joint fund. This is not really a question of whether the donor has relinquished all control, but rather whether the donor has evidenced the requisite intention. Even where the donor's intent is to give a present interest, he has, as a rule, power to withdraw the entire sum at any time. Has he, then, so long as the *locus penitentiae* remains, relinquished all control? If a joint tenancy can exist in money deposited in a bank, the only answer to this question would be to say that regardless of the fact that the donor may withdraw all, the title of the donee to his proportionate share is not, by that act, destroyed, but the donor

[43] 48 Md. 550.

becomes accountable to the donee for such proportionate share. This is the opinion of the courts in New York.[44]

However, the fact that the donor withdrew all or the greater part of the deposit has been held to be evidence tending to disprove his actual intention to create a joint tenancy.[45] If the New York courts are right in their view that the character of joint tenancy follows the money after it is withdrawn, an answer is given to one of our previous questions: "Is the joint tenancy in the credit or in the money?" This question has seldom been raised. The courts generally assume that the joint tenancy is in the money. If this is so, is the joint tenancy severed by a withdrawal by one joint tenant of his moiety; or must we say there is a different rule with regard to money—that the joint tenancy attaches to each unit of the whole? If this were so, a joint tenant could not withdraw his half and have a clear title to it, nor could he withdraw any portion of his share for his own use without the question of a resulting trust being raised. Of this the Supreme Court of Missouri says:[46]

Taking a common sense view of the matter, if a husband and wife have a joint bank account, either or the survivor to draw, and therefrom he buys a suit of clothes or an automobile, or she a dress or some jewelry, it would seem forced and unnatural to say the purchaser becomes a trustee for the other spouse as to a joint interest in the property. An accounting of the multitude of transactions that would arise in the family relation would be complicated indeed. The very fact that each is given the separate right to draw on the account would seem equivalent to a standing permission to appropriate parts of the fund from time to time. . . .

On the other hand, the arrangement is loose and affords opportunity for injustice and overreaching. And logically, if the parties have a joint interest in the bank account they ought to have

[44] Moskowitz v. Marrow, 251 N. Y. 380; Marrow v. Moskowitz, 255 N. Y. 219; O'Connor v. Dunnigan, 143 N. Y. Supp. 373, affirmed in 213 N. Y. 676; Strail v. Suter's Estate, 248 N. Y. Supp. 624.

[45] In re Porianda's Estate, 256 N. Y. 423.

[46] Ambruster v. Ambruster, (Mo.) 31 S. W. (2d) 28.

a like interest in property in which the joint funds are invested —nothing further appearing. In our opinion the rule announced in the New York case, *Moskowitz* v. *Marrow* . . . is correct and best fits the peculiar relation created by a banking arrangement of this character; that rule is, as we have stated, that the joint form of the account, either or the survivor to draw, of itself alone raises a presumption of fact, or inference, that the joint interest of the depositors follows funds withdrawn by either and negatives the idea that such withdrawals were severed from the joint estate and appropriated by the drawer to his own use. But the presumption is a weak one and readily yields to parol proof of the real intention of the parties. And while it makes a prima facie case for the party asserting the joint interest, the burden of proof is on him to establish his title by a preponderance of all the evidence.

The Missouri and New York decisions are aided by statutes which, during the joint lives of the parties at least, make the opening of an account in the joint names of two or more persons—payable to either or the survivor—prima facie evidence of an intention to create a joint tenancy. This does not materially change matters, however, for the prima facie case might be overcome by evidence that there was no intention to make a gift and in the end the same principles govern.

In some cases where the facts would not warrant the finding of a gift *inter vivos* or *causa mortis,* the courts have attempted to sustain the right of the surviving cotenant in a fund to which he had not contributed on the theory that a trust had been established for him. No reason appears why such a trust could not exist provided all the requisites of a trust are complied with. There must be a sufficient declaration of trust. The mere form of the account in the joint names of two persons alone would not be sufficient.[47] The settlor might constitute himself or some third person a trustee. The bank itself, being a debtor of the depositors, could not be considered

[47] Ide v. Pierce, 134 Mass. 260; Norway Sav. Bank v. Merriam, 88 Me. 146.

as a trustee. Could the settlor constitute himself as trustee for himself and another jointly? Could he constitute himself and his co-tenant trustees for each other as was done in the case of *Sturgis* v. *Citizens' National Bank*?[48]

There the owner of money opened a bank account in the name of "J. T. M. Sturges and Montrue B. Foulke in trust for both joint owners, subject to the check of either, balance, at the death of either to go to the survivor." When the objection was made that no trust could exist because the beneficiaries and the trustees were identical, the court said:

> This court[49] upheld as a valid gift a deposit, "in account with Sarah Hunter, or Sarah R. Heinema, in trust for both, joint owners, subject to the order of Sarah Hunter," and so far as question in this case is concerned, there seems to be no essential difference between a deposit in the name of one trustee or the other and a deposit in the name of one *and* the other. The trust provision made use of in these deposits as an alternative to delivery of the subject-matter of the gift is nothing more than a declaration that, despite the retention of control by one of the beneficiaries, it is in the interest of both that the property is held. While it may be illogical to declare that both hold in the interest of both when only one holds control of the fund, it seems to be none the less a clear and effective declaration that the donor no longer holds or controls it except in the joint interest, and the sufficiency of such a declaration, as an alternative to delivery in making the gift, is all we are concerned with.

It requires rather a throw of the imagination to comprehend such a trust as the court upholds. One cannot constitute himself a trustee for himself. Why should he be able to hold in trust for himself and another jointly? One still has legal title when he holds jointly, and he still owns a moiety.

Perhaps, then, the court means that each holds his share in trust for the other. Under this theory each

[48] 152 Md. 654.

[49] Stone v. National City Bank, 126 Md. 231.

would be entitled to the beneficial title of half, which would ripen into a legal title by the terms of the trust when the other died, and a beneficial interest in remainder in the other half, which would merge with the legal title when the life beneficiary died, thus giving the survivor the whole legal title. The estate so created could hardly be considered a joint tenancy; the unity of interest requisite to a joint tenancy is lacking, because in that half in which one has a legal title the other has an equitable one. In the case of *Booth* v. *Oakland Bank of Savings,*[50] the court sustained as a trust a transaction in which an order was given to the bank, "In re savings deposit 7041, in my name. Pay to the individual order of either Cornelia E. Booth or Aurelia L. James, or myself. Signed, Frances A. Bell." It will be noted that this could not be a joint tenancy, the use of the disjunctive negativing such an estate. Although there is no express declaration of trust either written or parol, the decision which declared a trust to exist must be classed as an exception because of a statutory provision, for courts do not as a rule enforce as a trust a transaction intended as a gift but imperfect for that purpose.[51]

In *Ladner* v. *Ladner,*[52] the depositor took several certificates of deposits in the form: "This certifies that Alfred Ladner has deposited with the Hancock County Bank at Pass Christian, Miss., $2,000, payable to the order of Alfred Ladner and Alice Ladner Moran or either of them or the survivor." The contest between the survivor and administratix involved the claim of the latter that the depositor ineffectually attempted to make either a gift *inter vivos* or testamentary of the money, and the claim of the former that the intent of the depositor was to create a parol trust. In support of the latter contention was evidence that the depositor had stated to the cashier of the bank that he wanted to place his money in the name of five of his children, but that he

[50] 122 Cal. 19.

[51] Howard v. Dingley, 122 Me. 5.

[52] 128 Miss. 75.

was to draw interest while he lived. This was sustained as a trust. The depositor constituted himself a trustee, but not for the joint benefit of the co-depositor and himself. The corpus was given to the co-depositor, the income only being reserved by the depositor. There was no intention to, and the fact was that he did not, draw upon the funds.

Whether or not we agreed that this could constitute a trust, it is certain no joint tenancy was thereby created. If anything passed at his death it was not because of survivorship incident to joint tenancy, but because of the terms of the trust. From this we may conclude that a trust is not prerequisite to the creation of a joint tenancy, but rather is employed by the courts as a basis for sustaining the survivor's right in a fund when the evidence fails to sustain a gift, that being deemed a prerequisite to the creation of a joint tenancy.

The survivor's right in a joint fund is sometimes sustained on the ground of a contract which is said to control regardless of a gift or a trust. One of the first cases to advance this theory was that of *Chippendale* v. *North Adams Savings Bank.*[53] In that case, one Williams had savings accounts in his name in two banks. With his sister he went to the banks where the accounts were kept and at one requested them to insert in the pass book the additional words: "Payable also to Abbie Worthington. Either party or the survivor of them may draw the whole or any part now or hereafter deposited on this account with interest." The sister signed the by-laws of the bank and the necessary identification card. The bank books were put in a box to which both had access, and the box was left for safekeeping with one of the banks. It will be noted that under similar facts other courts have found that the transaction was sufficient to establish the gift necessary to the creation of a joint tenancy. But here, the court found there was no gift. The gift the court appears to refer to is not that necessary to give the

[53] 222 Mass. 499.

donee a joint interest but that which would take effect upon the death of the depositor. The court said:

> In such a case there is no gift of the balance upon the death of Williams. Mrs. Worthington (when she survived Williams) became the owner of the balance undrawn by virtue of the contract of deposit, and not by virtue of a gift which took effect on Williams' death. Mrs. Worthington takes as survivor by virtue of the terms of the deposit in the same way that a joint tenant takes as survivor where land has been conveyed (as it may be conveyed, through a conduit) by way of gift to the donor and donee as joint tenants. . . . If the donee survives, in that case, he takes by virtue of the estate created by the conveyance and not by virtue of a gift which takes effect upon the donor's death. This is established by the principles on which it is settled that a donor may make a valid gift of property reserving to himself a life interest in the property given.

This simply says that if Mrs. Worthington is entitled to the balance in the accounts, it is not because of a gift to take effect at the death of Williams. But what is meant by the sentence that she "takes as survivor by virtue of the terms of the deposit in the same way that a joint tenant takes as survivor where land has been conveyed through a conduit by way of gift to the donor and donee as joint tenants?" Does it mean she takes as a joint tenant? The court carefully avoids calling this a joint tenancy. In fact, we might say it negatives the idea because the terms of the contract with one of the banks did not include any provision for survivorship. All that was stated was the phrase, "May be drawn by his sister Abbie Worthington." According to the court, this meant that the deposit might be drawn by her at any time before or after Williams' death. We seriously suspect the court of working from desired result to a reason.

If no estate of joint tenancy is created, but the survivorship rights are the result alone of a contract, the validity of that contract must be determined by the usual rules. Two persons go to the bank; one furnishing all the money says to the bank, "You may use this money,

if in consideration thereof you will agree to repay it on the demand of myself or my companion." There is no doubt that the bank would be bound by the terms of the contract; but does that establish the title to the property as between the depositor and his companion? If the element of a gift is disregarded there is nothing to show that the companion was anything more than an agent to receive the sum for the depositor. It would be necessary to produce evidence of the intention of the parties as to why the companion's name was included[54] (in the absence of a statute making the act of opening a joint account prima facie evidence of an intention to create a joint tenancy). Perhaps the contract is between the depositor and his companion as well as between the depositor and the bank. If that is the case, the transaction must fail as between them, for the companion furnishes no consideration. If each furnished one-half of the money another case would arise.

Some enlightenment may be thrown upon the Chippendale case when we refer to the language in a case there cited to support the contract idea. In *Attorney General* v. *Clark*,[55] two sisters, each furnishing one-half of the money, opened savings accounts in the style of "either Elizabeth M. Clark or Mary M. Clark or the survivor of either." In determining that no succession tax was due from the survivor, the court said:

> When they created an estate in joint tenancy in the real estate and personal property . . ., a contract was made between them for a valuable consideration, and in the absence of fraud or anything to indicate that it was not entered into in good faith, it constituted a valid agreement and must be recognized as such.
>
> It cannot be found that there was a gift of one-half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statutes, because the joint tenancy was not severed during the lifetime

[54] Bolton v. Bolton, 306 Ill. 473.
[55] 222 Mass. 291.

of the tenants. Each sister contributed an equal amount for her interest . . . when the joint tenancy was created, and there is nothing to show that the right of survivorship was not as valuable to one as to the other . . .

We are of the opinion that the contract between the parties creating a joint tenancy in the property in question cannot be held under the circumstances to be a voluntary gift without consideration and so liable to a succession tax.

If this is what the court in the Chippendale case was referring to, the facts are not sufficiently similar to warrant the application of the same principles. Looking back a little farther, however, we find another Massachusetts case which throws further light on the subject. In *Brown* v. *Brown*,[56] the question was whether money given by a husband to his wife for deposit in her own name in the bank, was upon her death the property of the wife or the husband, the latter claiming the money on the theory that a wife could not take title to property by direct gift from the husband. Despite the married woman's act, the law in Massachusetts still was that a married woman could not acquire property by gift from her husband. But the court said this was not a direct gift from the husband to the wife, because

If the wife, as agent of her husband, received this money from his hands and as his agent delivered it, while still his, to the bank and still acting as his agent, directed the bank, upon receiving the money, to make a contract with the wife to deliver a like amount to her, and the bank, taking the money from her as the agent of her husband, did, in compliance with the directions given by her as such agent, thereupon deliver to the wife, acting in her individual capacity, the bank book made out in her name, then the bank has made a contract with the wife, and her title to the account is good. She gets a title, not by gift from the husband, but by contract with the bank.

In this case the husband had a donative intent. We do not understand that this could be dispensed with.

[56] 174 Mass. 197.

If a husband placed money in the bank in his wife's name for the convenience of drawing the money during his absence or disability and handling of his affairs, the bank having no knowledge of the arrangement, it is possible (especially in case the statute contained such a proviso as that in the Illinois statute) that the bank would not be liable to the husband's executor for paying the balance to the wife after his death. As between the executor and the wife, however, the latter would have no right to the money,[57] and the mere fact that the legal title to the money passed to the wife through the intervention of the bank would make no difference—she would be liable as a trustee under an express trust. Or, suppose that for the sole purpose of avoiding the rules of the bank with regard to limitations on the size of accounts, a man deposits money in the bank in the name of his grandson; he reserves the right to draw it out himself and does not intend that the grandson shall have any part of it. Can it be claimed that merely because it is in his name the grandson is entitled to the money although the donative intent of the depositor is clearly negatived?

The most that can be said for the contract theory is that the contract with the bank takes the place of delivery.[58] Prima facie the title is placed in the name of the co-depositor as a gift which could only be rebutted by clear evidence of a contrary intent or arrangement. When money is deposited in the names of joint depositors, either or the survivor to draw, prima facie the bank takes title to repay to the joint depositors. But, that should not, without a statute such as New York's, create a conclusive presumption that there was a parting of all rights in the money by the one furnishing the entire consideration.

The only other ground on which the contract theory could be sustained would be that the co-depositor was a

[57] Marshal v. Crutwell, 20 L. R. Eq. 328.

[58] New Jersey Title Guarantee & Trust Co. v. Archibald, 91 N. J. Eq. 82.

beneficiary of a contract. In such case, to entitle the beneficiaries to sue on the contract, the courts would have to say that a purely voluntary relation on the part of the promisee (the depositor) to the beneficiary would be all that was necessary. This is not an accepted doctrine in all states. Generally the promisee must be under an obligation to the beneficiary.

If the courts have something else in mind, it is something which was not known at common law—it is new law created for the first time by the courts.

The Chippendale case appears to have induced courts of other states to follow its rule[59]—in some cases blindly and without any adequate explanation—unless it be that a joint tenancy is created by the contract the foundation for which is the donative intent of the depositor. In the case of *Erwin* v. *Felter*,[60] however, the court is plain in its meaning and seems to support our conclusion that the contract is entered into by the depositor with the bank with the donative intent of giving his co-depositor a present interest as a joint tenant. This explanation of the contract is satisfactory. The difficulty with the decision in *Erwin* v. *Felter* appears for the first time when we note that joint tenancy in personalty was considered abolished by the statute of 1821 in Illinois and it was never after expressly permitted until the statute of 1919, passed after the decision in *Erwin* v. *Felter*. This decision was declared not to be erroneous, however, in the case of *Illinois Trust & Savings Bank* v. *Van Vlack*,[61] where it was said:

In the recent case of *Erwin* v. *Felter* it was said that "a joint tenancy is not confined to real estate but may exist in personal property," without mention of this decision[62] or the statute, which were not relied upon or referred to by counsel in argument or mentioned even in the petition for rehearing. It was

59 Deal's Adm'r v. Merchants' & Mechanics' Savings Bank, 120 Va. 297; Wisner v. Wisner, 82 W. Va. 9; Erwin v. Felter, 283 Ill. 36.

60 283 Ill. 36.

61 310 Ill. 185.

62 Hay v. Bennett, 153 Ill. 271.

not intended to overrule the decision [of *Hay* v. *Bennett* which decided that the common law rule of survivorship in respect to personal property jointly owned did not prevail in Illinois] or the statute, but the statute was regarded as not applicable to the contracts involved in that case. It was intended to hold that the right of survivorship stipulated in the certificates of deposit as an essential part of them was not unlawful, and the statement that a joint tenancy may exist in personal property should not have been made without some qualification or limitation. . . . Whether this constituted a technical joint estate or not, it was held that the contract was not unlawful but would be enforced.

What is a technical joint estate? Does the court mean by technical joint estate that it is creating by judicial decision a new estate similar to that known at common law? The power of the court to do this would be vehemently denied by all common law jurists. The answer may, perhaps, be found in the expression that the court in *Erwin* v. *Felter* should not have stated that a joint tenancy may exist without qualification or limitation in personal property. What qualification or limitation it does not say. We have already decided that if such a contract is to be supported it must be either because it creates a common law joint tenancy or a contract for the benefit of a third person which most states will not enforce when it is entirely gratuitous. Does the court mean, then, that the contract does create a common law joint tenancy? So to hold would require a different interpretation of the Illinois statute of 1821 from that given in *Hay* v. *Bennett.* We should be obliged to say that the intent and purpose of the legislature was to abolish the incident of survivorship when property came to two persons other than by agreement between themselves. The survivorship incident of joint tenancy was looked upon with disfavor because it interfered with proper provisions for posterity. If there were no severance before death of one of the joint tenants the property would not pass by the will of the decedent to the natural objects of his bounty nor would it pass by intestate laws. To that extent, therefore, the natural objects

of the decedent's bounty would not be provided for. But a man may deprive the natural objects of his bounty by gifts during his lifetime, and so if by voluntary conveyance he creates a joint tenancy, the creation of that estate is not within the spirit of the statute. Similar reasoning was expressed by the Appellate Court of Illinois in *Reder* v. *Reder*.[63] Ohio and Connecticut arrived at the same conclusion although joint tenancy with survivorship was not recognized.[64]

In determining the rights of the survivor, most courts have assumed that if the proper donative intention is present and the proper transfer or contract of conveyance is made, a joint tenancy does exist in bank accounts. Few courts have attempted to test the joint account by the rules of a common law joint tenancy—the four unities. Are the four unities present and if they are, does a withdrawal by one joint tenant destroy the joint tenancy?

If the joint tenancy exists in the money itself, and one, furnishing the entire consideration, deposits the money in an account payable to himself and another as joint tenants, there is no unity of time. It is the same where the owner of real property attempts to convey to himself and another as joint tenants. One cannot convey to himself. That portion which he attempts to convey to himself remains in him, while the one attempted to be brought in as a joint tenant takes as a tenant in common.[65] Thus, the parties do not acquire their title at the same time. This was the opinion of the court in *Appeal of Garland*,[66] where it was said:

Even if there was sufficient evidence of intent on the part of either to make a gift of a joint interest with a right of survivorship, we think it must fail under the law of joint tenancies held in this state. The essential unities are not present. . . .

63 228 Ill. App. 21, affirmed in 312 Ill. 209.

64 Union Trust Co. v. Hutchinson, 27 Oh. App. 284; Cleveland Trust Co. v. Scobie, 114 Oh. 241; State Bank and Trust Co. v. Nolan et al., (Conn.) 130 Atl. 483.

65 Deslauriers v. Senesac, 331 Ill. 437.

66 126 Me. 84.

In case of a gift of an interest in a chattel or chose in action, there appears to be no unity of time or title. The source of the title of the donor and the time of acquisition appears to be entirely different from that of the donee. Even in case of a change in a bank deposit, the novation by the bank in acknowledging a joint obligation, when its obligation before was only several, does not constitute the source of the donor or donee's title. The donee receives his title of the chose in action from the donor; the bank by novation simply acknowledges a new obligation in place of the old by direction of the donor. The title of the donee does not come from the bank.

Strictly speaking, however, the donee does not receive title nor does the donor keep his. The bank is not a mere bailee or trustee of the money. The bank becomes the debtor of the donor and donee; all they have is a chose in action—the bank has title to the money. This chose in action comes to them at the same time, and to that extent there is unity of time. Title is not ordinarily thought of in connection with a chose in action, which is a mere right. A chose in action is property, though, and the parties have such an interest in such choses in action, as stocks, bonds, and bank accounts that they can be reached by their creditors. The property which the parties have in the chose is analogous to title in realty and tangible personalty. By analogy, therefore, all the estates possible in other personalty should be possible in it.

In all other choses in action in which joint tenancy is commonly recognized—stocks, bonds, and other evidences of value—the extent of property covered is constant. If two parties hold stock issued to them as joint tenants and they wish to dispose of it, they both assign their interest together and the consideration is paid to both of them. At that time the joint tenancy is severed. Under the statutes requiring an intention to create a joint tenancy to be evidenced by some writing, it would seem unsound to say that the joint tenancy feature follows the property through whatever conversions take

place. Once the property held in joint tenancy is converted, the joint tenancy is severed and the parties own the new property as tenants in common. If the stock or bond is sold or the money in bank account is entirely withdrawn, the joint tenancy which existed in the chose in action is extinguished because the chose itself is extinguished. If money is deposited in the bank in joint tenancy with no other provision, the joint tenancy is in that particular debt which the bank owes the joint tenants. If that debt is changed by withdrawals and deposits, the debt is not the same. It would not be presumed that one of the joint tenants in withdrawing half or less than half of the deposit was drawing anything but his own half, any more than if one deeding one-half of a tract of land held in joint tenancy would be deemed to convey any but his own half. Immediately one withdraws his half or part of his half the unity of possession is destroyed.

Strictly speaking, therefore, a joint tenancy could not exist if the chose in action were not to remain intact, and the survivorship rights could not attach unless the joint tenancy continued in the chose in action until the death of one joint tenant. What the surviving joint tenant would be entitled to then would be the individual right to enforce the debt. It would be enforced, of course, entirely for his own benefit, since the donor's title to the money was extinguished by the deposit. The donor's only right would be to enforce repayment of the money. This right would have passed, upon his death, to the surviving joint tenant, so no interest would remain in him to be asserted by his personal representative.

Although the joint tenancy in the particular property so held is destroyed, there is no reason why the parties, by properly evidencing their intention, might not take the new property for which the first was exchanged, or into which it was converted, as joint tenants. This intention could be accomplished by a contract that all property coming to them by acquisition, transfer, conversion or increase would be taken by them as joint tenants.[67]

[67] Stonewall v. Danielson, 204 Iowa 1367.

The mere contract to take property as joint tenants might not create a legal estate in joint tenancy, but it is reasonable to assume that it would be recognized in equity under the doctrine that equity will consider as done that which ought to be done. And where the contract is executed, as where the two parties actually instruct the person conveying the legal title to convey it to them as joint tenants and it is so conveyed, a legal estate in joint tenancy would be created.[68] Similarly, the bank may agree with two persons to owe to them as joint tenants whatever debt exists in a particular account with the bank. Would it follow that it could hold any debit balance that might exist at any time for them as joint tenants? No reason appears why it should not.

But, the joint tenancy would still exist in the debt and not in the money which might be demanded in payment thereof. Thus, the money withdrawable according to the contract by either, would not be joint property and would belong to the withdrawer absolutely unless the parties had another valid agreement to the contrary. However, the contract creating the joint tenancy should be a valid one, supported by a valuable consideration. As to the bank, there is a valuable consideration in all cases in the deposit. If both parties furnish money there is a valuable consideration which would enable either to enforce the contract against the bank. But if one furnished the entire consideration, his joint tenant would only have a right to enforce the contract on the theory that the donor by the act of deposit had given to the donee an immediate interest in the fund, and this interest would be the consideration moving from the donee to the bank. If the donee is not a party to the contract he would have no interest in the fund unless he could prove a completed gift. In such case, the bank might not be adequately protected. In a suit by the depositor's executor

[68] A joint purchase of land by two with equal payments creates a joint tenancy, Aveling v. Knipe, 19 Ves. 441. A purchaser of bank stock in the joint names of A and B with money belonging solely to A upon the death of A vests the legal right to the shares in B, Garrick v. Taylor, 29 Beav. 79.

against the bank it might be shown that there had been no completed gift, that the depositor had intended only a testamentary disposition. But a proviso such as that in the Ohio and Illinois statutes might eliminate the necessity of the donee signing an agreement, at least at the time of the deposit.

In the recent case of *Rockefeller* v. *Davenport et al.*,[69] the Supreme Court of Massachusetts held that it was immaterial that the donee did not sign the deposit slip. Here the donee was present when the deposit was changed and consented thereto.

Statutes in the various states may alter the requirements and render useless the foregoing considerations. That of New York respecting joint bank accounts, for instance, obviates all the difficulties otherwise encountered in attempting to apply the principles of joint tenancy to a fluctuating bank account. It is doubtful whether the difficulty is obviated by a statute such as that of Illinois, heretofore quoted, which permits the creation of joint tenancy in personal property by a writing expressing an intention to create it, but in no way provides against the rules of severance. In states with no saving statutory provisions the contract of the parties should be sufficient to cover not only the account as it exists at the time but also as it may exist with new deposits or withdrawals. This is usually expressed on the signature cards, furnished by banks for the creation of an account or joint tenancy, by the expression, "Our intention is to create a joint tenancy in this account and in accounts in continuation hereof, with right of survivorship."

Such evidence of intention prima facie would be evidence of an intention to create a joint tenancy, and if one depositor furnished the entire consideration it would be prima facie evidence of a donative intent to constitute the other party a joint tenant with an immediate interest in the fund. This evidence might, however, be rebutted and

[69] 177 N. E. 856.

the true intent of the parties shown. The true intent of the parties might be shown even after the death of one, in the absence of such a statute as exists in New York, which makes the evidence at that time conclusive.

Joint tenancy in fluctuating bank accounts is an entirely new application of the doctrine of joint tenancy as it was originally known with reference to real property. We have thus turned to advantage a common law estate which in its early conception was not favored in this country. Its use as an estate involuntarily imposed upon the tenants has largely disappeared and it has become today almost wholly a voluntary one. In applying it to bank accounts, we seem to have carried it far from its original use and to have introduced new considerations uncontemplated in its application to other forms of property. It should be remembered, however, that the same estates that exist in realty exist in personalty only by way of analogy and that the peculiar nature of the personal property must be taken into consideration in applying the rules developed with regard to realty. Necessarily therefore, the aspect of joint tenancy as it existed in real property will differ from that applicable to such intangible property—choses in action—as bank accounts.